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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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IN THE

COURT OF CRIMINAL APPEALS OF TEXAS

AUSTIN, TEXAS

KEITH BALKISSOON,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

On Review from the Court of Appeals for the Third District of Texas
Court of Appeals No. 03-13-00382-CR
An Appeal from the 26th Judicial District Court, Williamson County, Texas
Trial Court No. 11-1434-K26

STATE'S BRIEF ON DISCRETIONARY REVIEW

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IDENTIFICATION OF THE PARTIES

Pursuant to Texas Rule of Appellate Procedure 38.2(a)(1)(A), the State supplements the list of the names of interested parties, as follows:

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

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STATE'S BRIEF ON DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, Respondent, the **STATE OF TEXAS**, by and through the Williamson County District Attorney, the Honorable Shawn W. Dick, and, pursuant to Rules 38.2 and 70.2 of the Texas Rules of Appellate Procedure, files this, its State's Brief on Discretionary Review in the above-styled and -numbered cause of action, and in support thereof, would show this Honorable Court as follows:

STATEMENT REGARDING ORAL ARGUMENT

This Court has previously announced that oral argument will not be permitted.

STATEMENT OF FACTS

In the present case, the record demonstrates that at approximately 2:30 a.m. on the morning of October 7, 2011, Trooper Michael Reisen of the Texas Department of Public Safety conducted a traffic stop on Keith Balkissoon's vehicle after he observed the vehicle fail to yield the right of way out of a private drive located on the access road of Highway 620 in Williamson County. 4 R.R. at 10. During the traffic stop, Reisen concluded that Balkissoon was intoxicated and arrested him for driving while intoxicated. 4 R.R. at 11. Reisen asked Balkissoon to provide a sample of his breath or blood; however, Balkissoon refused. 4 R.R. at 13. Reisen then proceeded to have Balkissoon's blood drawn without his consent, based on Reisen's understanding that Balkissoon had two prior DWI convictions and that Texas law allowed Reisen to obtain a blood sample under those circumstances. 4 R.R. at 13-14; s*ee* Tex. Transp. Code § 724.012(b)(3)(B). Reisen further testified that he "could have" obtained a search warrant for Balkissoon's blood but decided not to do so. 4 R.R. at 14-15. When asked why he made this decision, Reisen

testified that "[t]here was no need to. The law—the law was behind me taking the blood sample without a search warrant." 4 R.R. at 15. Reisen added that it likely would have taken him "awhile" to obtain a warrant if he had decided to do so. 4 R.R. at 16. Reisen testified:

> It's a lengthy process because we have to book them in [to jail]; we have to do the paperwork; we have to e-mail the paperwork to a—we have to get a hold of a prosecutor; e-mail the paperwork to the prosecutor, who's got to e-mail it back to me. I've got to drive to the Judge's house; got to get him to read over it, sign it. Drive back to the jail; sign some paperwork to get him out of the jail to drive him to the hospital; wait at the hospital for a little bit in triage until a qualified technician comes down. They take the blood. I fill out the paperwork for the blood warrant, to seal it properly; put him back in my car, and get him back to the jail, and re-book him in.

4 R.R. at 16. When asked to estimate how long the above process took, Reisen testified that it had recently taken him approximately four hours to obtain a blood draw warrant with a cooperative suspect. 4 R.R. at 16.

Reisen further testified that in the present case, "everything was prolonged" because of, what he characterized as, Balkissoon's refusal to cooperate during the stop. 4 R.R. at 12. For example, Reisen explained, Balkissoon refused to cooperate with Reisen regarding the disposition of Balkissoon's vehicle following his arrest. 4 R.R. at 11-12. According to Reisen, the vehicle had to be either parked in a proper location, picked up by a friend, or towed, but Balkissoon "just would never answer the question." 4 R.R. at 11-12. Eventually, Reisen had to call a tow truck to tow

Balkissoon's vehicle. 4 R.R. at 12. The time index on the video evidence demonstrates that the elapsed period of time from the initial stop until the arrival of the tow truck was one hour. SX1.

Reisen further testified that he usually conducts DWI investigations without a partner and that during his investigations, personnel from "Williamson County may or may not come back me up." 4 R.R. at 17. Reisen added, "[b]ut even if someone does come, it's my investigation. I do everything myself." 4 R.R. at 17. Reisen explained that when he needs to obtain a warrant, there is no one to help him complete the warrant paperwork and no other officer available to take custody of the suspect while he procures a warrant. 4 R.R. at 17. According to Reisen, at the time of Balkissoon's arrest, he was aware that a DWI suspect's blood-alcohol concentration begins to diminish "as time goes on" and that, during the time that he would have spent obtaining a warrant in this case, the alcohol-concentration level in Balkissoon's blood would have been "depleting." 4 R.R. at 12, 17. When asked to describe how long it took him to obtain a sample of Balkissoon's blood without a warrant, Reisen testified, "Not long. As soon as I walked in [to the Williamson County Jail], we went right to the medical—I mean, after he got patted down and secured, we went right to the medical unit and took his blood right then and there." 4 R.R. at 15.

Judge Wayne Porter, a magistrate in Williamson County, also testified during the suppression hearing. Judge Porter testified that he works at the jail between 7:30 a.m. and 1:00 p.m., and is on call after hours to sign search warrants if requested by an officer. Judge Porter explained that, after he leaves the jail for the day, "[t]here's nobody in the jail until the next morning." 4 R.R. at 23. The State asked Judge Porter to confirm whether, after hours, "there is nobody on duty that is available for [officers] to go to for warrants," and Judge Porter answered, "That's correct." 4 R.R. at 24. Finally, Judge Porter stated that Williamson County did not have a "24-hour magistration service," similar to the one that exists in Travis County. 4 R.R. at 24.

SUMMARY OF ARGUMENT

This Court has granted review on Balkissoon's second and third issues. In his second issue, Balkissoon contends the court of appeals erred in finding that exigent circumstances existed to justify the trial court's denial of the motion to suppress. The responds by State asserting that, given the facts in the record, the trial court could have found that the absence of other officers to assist Reisen, combined with the then-existing difficulties of obtaining a warrant in Williamson County after hours, including the absence of a magistrate on duty at the jail, made obtaining a warrant impractical in this case. Therefore, the State asserts that the court of appeals

did not err in concluding that exigent circumstances were present here which justified Reisen's decision to proceed with obtaining a blood sample from Balkissoon without a warrant.

In his third issue, Balkissoon contends that the law enforcement cannot create their own exigency to make a warrantless arrest or search. The State responds by asserting that the U.S. Supreme Court and this Court have previously stated that police officers may enter a home without a warrant, even when their conduct created the exigency, as long as the officers did not create the exigency by violating or threatening to violate the Fourth Amendment. The State further asserts that, given the record in this case, law enforcement did not impermissibly create an exigency, as they did not violate or threaten to violate the Fourth Amendment.

ARGUMENT & AUTHORITIES

Ground Two[1] – Did the Court of Appeals err in finding that exigent circumstances existed?

The Applicable Standards of Review

This Court reviews a trial court's ruling on a motion to suppress under a bifurcated standard of review. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). The trial court's factual findings are reviewed for an abuse of discretion.

[1] This Court granted review as to Balkissoon's second and third grounds, only.

Id. The reviewing court gives almost total deference to the trial court's determination of historical facts, particularly when the trial court's fact findings are based on an evaluation of credibility and demeanor. *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). The same deference is afforded the trial court with respect to its rulings on the application of the law to questions of fact and to mixed questions of law and fact, if resolution of those questions depends on an evaluation of credibility and demeanor. *Id*. For mixed questions of law and fact that do not fall within that category, a reviewing court conducts a de novo review. *Id*.

At a suppression hearing, the trial court is the exclusive trier of fact and judge of the credibility of the witnesses. *Maxwell v. State*, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002). A trial court may choose to believe or to disbelieve all or any part of a witness's testimony, even if that testimony is uncontroverted. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). An appellate court must uphold a trial court's ruling on a motion to suppress if that ruling was supported by the record and was correct under any theory of law applicable to the case, even if the trial court gave the wrong reason for its ruling. *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003).

The trial court made no express, written findings of fact, and neither party

requested them.[2] Therefore, this Court must presume that the trial court found facts consistent with its ruling. *Hereford v. State*, 339 S.W.3d 111, 120 (Tex. Crim. App. 2011) Thus, the court of appeals, as well as this Court, must afford almost total deference to the trial court's implied determination of historical facts that are supported by the record. *Id*.

The Law Concerning the Exigency Exception to the Warrant Requirement

The Fourth Amendment provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause[.]" U.S. Const. amend. IV. It is well settled that taking blood from a suspect requires an intrusion into the human body and implicates an individual's "most personal and deep-rooted expectations of privacy," and therefore such falls under the Fourth Amendment's warrant requirement. *Cole v. State*, 490 S.W.3d 918, 923 (Tex. Crim. App. 2016) (*quoting Missouri v. McNeely*,

[2] Balkissoon contends that the trial court made a specific oral finding that no exigent circumstances existed in this case. Balkissoon's Brief, at p. 11. The State asserts that trial court never made such a finding of fact. The trial judge merely stated that he based the denial of the motion to suppress on the State's "good faith" argument. 4 R.R. at 44. The trial court's legal basis for the denial of the motion does not limit this Court's review, as this Court must uphold the trial court's ruling, if that ruling was supported by the record and was correct under any theory of law applicable to the case, even if the trial court gave the wrong reason for its ruling. *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003). Alternatively, should this Court determine that the trial court did, in fact, make an explicit finding of fact, the State would assert that said finding is either ambiguous or insufficient to resolve the legal issue before this Court, and therefore, this Court should remand this case to the trial judge to make findings of fact with greater specificity. *State v. Mendoza*, 365 S.W.3d 666, 670 (Tex. Crim. App. 2012).

__ U.S. __, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696 (2013)).

This Court has explained that the exceptions to the requirement of a search warrant include, *inter alia*, "voluntary consent to search, search under exigent circumstances, and search incident to arrest[.]" *McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003). Once an accused establishes that a search was conducted without a warrant, it then becomes the State's burden to show that the warrantless search falls within one of these exceptions. *See id*; *see also State v. Betts*, 397 S.W.3d 198, 207 (Tex. Crim. App. 2013). In the present case, because there was no search warrant for the blood draw performed on Balkissoon, the State had the burden of proof to establish an exception to justify the warrantless search and seizure of his blood. *See McGee*, 105 S.W.3d at 615. Based on the evidence presented at the hearing on Balkissoon's motion to suppress, the trial court denied said motion reasoning that the officer acted in good faith; however, on appeal, the Third Court of Appeals upheld the warrantless blood draw finding that exigent circumstances existed and constituted a valid basis for the State's failure to obtain a warrant.

This Court's most recent and thorough handling of this issue is found in *Cole* and in *Weems v. State*, 493 S.W.3d 574 (Tex. Crim. App. 2016), where this Court set forth the applicable law pertaining to exigent circumstances and warrantless blood draws.

> As [*State v.*] *Villarreal* [475 S.W.3d 784 (Tex. Crim. App. 2014), reh'g denied, 475 S.W.3d 784 (Tex. Crim. App. 2015) (per curiam)] made plain, a warrantless search is *per se* unreasonable unless it falls within a well-recognized exception to the warrant requirement. The exigency exception operates "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." Exigency potentially provides for a reasonable, yet warrantless search "because 'there is compelling need for official action and no time to secure a warrant.'" Whether law enforcement faced an emergency that justifies acting without a warrant calls for a case-by-case determination based on the totality of circumstances. "[A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation." An exigency analysis requires an objective evaluation of the facts reasonably available to the officer at the time of the search.
>
> In *Schmerber v. California*, [384 U.S. 757, 770-72 (1966)] the United States Supreme Court held that, based on the circumstances surrounding the search, a warrantless seizure of a driver's blood was reasonable.
>
> . . . .
>
> Adopting a totality-of-circumstances approach, the Court held that the circumstances surrounding the blood draw rendered the warrantless search reasonable: (1) the officer had probable cause that Schmerber operated a vehicle while intoxicated; (2) alcohol in the body naturally dissipates after drinking stops; (3) the lack of time to procure a warrant because of the time taken to transport Schmerber to a hospital and investigate the accident scene; (4) the highly effective means of determining whether an individual is intoxicated; (5) venipuncture is a common procedure and usually "involves virtually no risk, trauma, or pain"; and (6) the test was performed in a reasonable manner.

Weems, 493 S.W.3d at 578-79 (footnoted citations omitted).

> . . . [T]he Court in *McNeely* held that the natural dissipation of alcohol in the bloodstream did not create a *per se* exigency justifying an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing. The *McNeely* Court held firm to the warrant requirement by stating that "where police officers can

> reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." Yet the Court still recognized the gravity of the body's natural metabolic process and the attendant evidence destruction over time. With this balance in mind, the Court adhered to a totality of the circumstances analysis with the notion that certain circumstances may permit a warrantless search of a suspect's blood. The narrow issue before the Court prohibited it from providing an exhaustive analysis of when exigency in intoxication related offenses may be found. However, the Court provided insight on the issue by identifying a few relevant circumstances that may establish exigency in this context. In addition to the body's metabolization, they include "the procedures in place for obtaining a warrant,["] "the availability of a magistrate judge," and "the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence."

Cole, 490 S.W.3d at 924 (footnoted citations omitted).

The U.S. Supreme Court further recognized in *McNeely*, that even in "routine" DWI cases, such as the present one, a combination of factors could combine to create exigency, depending upon the particular circumstances in each case:

> Although the Missouri Supreme Court referred to this case as "unquestionably a routine DWI case," the fact that a particular drunk-driving stop is "routine" in the sense that it does not involve "'special facts,'" such as the need for the police to attend to a car accident, does not mean a warrant is required. Other factors present in an ordinary traffic stop, such as the procedures in place for obtaining a warrant or the availability of a magistrate judge, may affect whether the police can obtain a warrant in an expeditious way and therefore may establish an exigency that permits a warrantless search. The relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a

> timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case.

McNeely, 133 S. Ct. at 1568 (citations omitted).

The exigency exception applies "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Id*. at 1558 (*quoting Kentucky v. King*, 563 U.S. 452, 460 (2011)). Exigent circumstances may justify a reasonable yet warrantless search "because 'there is compelling need for official action and no time to secure a warrant.'" *Id*. at 1559 (*quoting Michigan v. Tyler*, 436 U.S. 499, 509 (1978)). Whether law enforcement faced a situation that justified acting without a warrant calls for a case-by-case determination based on the totality of circumstances. *Id*. An exigent circumstances analysis requires an objective evaluation of the facts reasonably available to the officer at the time of the search. *Cole*, 490 S.W.3d at 923 (*citing Brigham City v. Stuart*, 547 U.S. 398, 404 (2006)).

In *Cole*, this Court concluded that a warrantless search was justified under the exigency exception to the Fourth Amendment's warrant requirement. *Id*. at 927. In *Cole*, the facts were as follows: While driving his vehicle at a high speed, Cole ran a red light and struck a pickup truck, causing an explosion that killed the driver of the pickup truck. *Id*. at 920. Longview Police Department officers arrived at the accident

scene and removed Cole from his vehicle. *Id*. EMS personnel arrived shortly thereafter and began evaluating Cole's injuries. *Id*. The lead accident investigator, Officer Higginbotham, arrived on the scene after officers had removed Cole from his vehicle and after EMS had taken Cole to the hospital. *Id*. Higginbotham spent approximately three hours at the scene of the accident performing his investigation, which was the "most significant obstacle law enforcement faced in obtaining a warrant for Cole's blood." *Id*. at 920, 925. The severity of the accident created a block-long debris field. *Id*. at 925. It was only after Officer Higginbotham completed his investigation of the roadway, damaged vehicles, distances, and debris was he able to "form probable cause to believe that Cole was responsible for the accident" and the other driver's death. *Id*. at 925. Additionally, both the time to complete the investigation and lack of available law enforcement personnel further hindered the warrant process. *Id*. This Court then discussed the relevant factors relevant to the existence of an exigent situation:

> … . Higginbotham testified that he believed it was not feasible for him to leave the accident scene and abandon the accident investigation or to wait until the accident investigation was complete before attempting to obtain a warrant. Because he was the only available officer capable of performing the accident investigation, his continued presence at the scene was vital. And without first completing the investigation, debris could not be cleared from the intersection and reopened to traffic. In Higginbotham's estimation, Officer Wright would not be able to obtain a warrant for him. After placing Cole under arrest, Wright was now responsible for his custody at the hospital and could no longer handle

that responsibility while simultaneously drawing up a statement regarding her belief of Cole's intoxication.

The accident scene's location and the public-safety danger required a number of officers at the scene to perform necessary responsibilities including securing the accident scene, directing traffic, and keeping the public away from the scene. We do not disagree with the court of appeals' conclusion that "[t]here is no indication that officers not on the scene were unavailable to help obtain a warrant." We do disagree, however, that an exigency finding cannot be made without the record establishing—and by extension, the State proving—that there was no other officer available to get a warrant in the lead investigator's stead. In all but the rarest instances, there will theoretically be an officer somewhere within the jurisdiction that could assist the lead investigator. Requiring such a showing in every case where exigency is argued improperly injects the courts into local law-enforcement personnel management decisions and public policing strategy. It further reduces the exigency exception to an exceedingly and inappropriately small set of facts, and would defeat a claim of exigency on the basis of a single circumstance in direct opposition to the totality-of-circumstances review *McNeely* requires. Nonetheless, the availability of other officers is a relevant consideration in an exigency analysis.

This record establishes that fourteen officers were present and who, in Higginbotham's estimation, were all performing important law enforcement or public-safety duties. Taking any one of them away, according to Higginbotham, would have left a necessary duty unfulfilled. This record further reflects that the fourteen officers at the scene made up nearly half of the minimum amount of officers the Longview Police Department requires for the entire city over two shifts. By the same estimation, the record does not establish that there was a readily available officer who could have gotten a warrant while Higginbotham continued his investigation and Wright kept Cole in custody at the hospital.

Even had Higginbotham attempted to secure a warrant from an on-call magistrate, the issuance of a warrant would have taken an hour to an hour and a half "at best." During that time, Higginbotham was reasonably concerned that both potential medical intervention performed at the hospital and the natural dissipation of

> methamphetamine in Cole's body would adversely affect the reliability of his blood sample. According to EMS, Cole reported having "pain all over." Higginbotham was reasonably concerned that the administration of pain medication, specifically narcotics, would affect the blood sample's integrity.
>
> In addition to the logistical obstacles of securing a warrant, Higginbotham knew that during the hour to an hour and a half necessary to obtain a warrant Cole's body would continue to metabolize the methamphetamine and other intoxicating substances he may have ingested. The court of appeals correctly notes that the record does not contain evidence regarding the rate the body metabolizes methamphetamine. But the lack of a known elimination rate of a substance law enforcement believes a suspect ingested does not necessarily mean that the body's natural metabolism of intoxicating substances is irrelevant to or cuts against the State's exigency argument. In fact, it serves to distinguish this case from *McNeely*.
>
> The *McNeely* Court relied in significant part on the widely known fact that alcohol "naturally dissipates over time in a gradual and relatively predictable manner." The lack of a known elimination rate is at odds with the undercurrent running through the *McNeely* opinion: While time is of the essence, a minimally delayed test when dealing with an alcohol-related offense does not drain the test of reliability because experts can work backwards to calculate blood-alcohol content at an earlier date. In this case, without a known elimination rate of methamphetamine, law enforcement faced inevitable evidence destruction without the ability to know—unlike alcohol's widely accepted elimination rate—how much evidence it was losing as time passed.

Id. at 925-27. Based on the foregoing consideration of the totality of the circumstances, this Court concluded:

> [L]aw enforcement reasonably believed that obtaining a warrant in this case would have significantly undermined the efficacy searching Cole's blood. The circumstances surrounding the taking of Cole's blood sample demonstrate that obtaining a warrant was impractical. Like the officer in *Schmerber*, law enforcement was confronted with

> not only the natural destruction of evidence through natural dissipation of intoxicating substances, but also with the logistical and practical constraints posed by a severe accident involving a death and the attendant duties this accident demanded. We therefore conclude that exigent circumstances justified Cole's warrantless blood draw.

Id. at 927 (footnoted citations omitted).

In stark contrast to *Cole*, this Court held in *Weems* that "[o]n review of the totality of the circumstances found in the record, we conclude that Weems's warrantless blood draw was not justified by exigent circumstances." *Weems*, 493 S.W.3d at 580. The relevant facts in *Weems* are as follows: Weems was driving himself and a friend home from a bar where they had been drinking. *Id*. at 575. On the way home, Weems's car veered off the road, flipped over on its roof, and hit a utility pole. *Id*. A witness, who stopped and was the first person on the scene, testified she observed Weems crawl out of the vehicle from the driver's side window, and when the witness asked if Weems was okay or if he was drunk, Weems said he was drunk. *Id*. Weems then ran from the accident scene. *Id*. The witness called 911. *Id*. Bexar County Sheriff's Deputy Muñoz responded to the call and later found Weems hiding under a nearby parked car, approximately 40 minutes after the accident. *Id*. at 576, 581.

Deputy Bustamante took custody of Weems from where Muñoz had detained him, and Bustamante immediately noticed Weems's bloodshot eyes, slurred speech,

bloodied face, inability to stand, and a strong smell of alcohol on Weems's breath. *Id*. at 576. Bustamante believed that Weems had sustained injuries in the accident, and therefore did not conduct field sobriety tests. *Id*. Based upon his observations, Bustamante arrested Weems on suspicion of driving while intoxicated. *Id*. Weems refused to give a breath or blood sample. *Id*. EMS treated Weems at the scene of his arrest, but because Weems complained of neck and back pain, EMS transported Weems to the hospital. *Id*. Deputy Bustamante followed the ambulance to the hospital, which took only a "couple of minutes." *Id*. At the hospital, Bustamante filled out a form asking the hospital to draw blood from Weems. *Id*. Notably, Bustamante was not the only deputy charged with investigating the accident, and he was accompanied by Deputy Shannon, Bustamante's instructor. *Id*. at 582. Because the hospital was particularly busy that evening, Weems's blood was not taken until more than two hours after Weems was arrested. *Id*. at 576. The subsequent testing of the blood revealed that Weems had a .18 blood-alcohol concentration. *Id*. Prior to his trial, Weems sought to suppress the evidence relating to the warrantless blood draw. *Id*. Without making any findings of fact or conclusions of law, the trial court denied the motion to suppress. *Id*. Weems was tried and convicted of felony DWI by a jury. *Id*. On appeal, Weems argued that the trial court erred in denying the motion to suppress the blood alcohol evidence, and the Fourth Court of Appeals agreed the

trial court erred and found the admission of the evidence harmful. *Id*.

On review, this Court affirmed. *Id*. at 582. The Court held that "[o]n review of the totality of the circumstances found in the record, we conclude that Weems's warrantless blood draw was not justified by exigent circumstances." *Id*. at 580. This Court explained that "[a]side from Weems's own self-imposed delay" when he fled the scene and the forty minutes' worth of alcohol dissipation caused by Weems, "little else in the record lends support to finding exigency in this case." *Id*. at 581. The record was silent as to whether Bustamante knew that it would take over two hours for the hospital to draw the blood; but, this Court concluded Bustamante's testimony suggested that substantial delay in obtaining Weems's blood was "at least forseeable." *Id*. Bustamante described the routine practice of transporting suspects to the magistrate's office, and if the suspect refused to consent to the blood draw, then the deputy would draw up an affidavit and present it to the magistrate for a warrant. *Id*. The record did not reflect how long the warrant process normally takes; and further, the record did not reflect what procedures were in place, if any, for obtaining a warrant when the suspect is taken to the hospital or whether Bustamante could have reasonably obtained a warrant. *Id*. Based on this lack of evidence in the record, this Court concluded that it was unable to weigh the time and effort required to obtain a warrant against the circumstances that informed Bustamante's decision to

order the warrantless blood draw. *Id*.

Further, this Court expressly distinguished the facts from those in *Schmerber*:

> Although both this case's record and that presented in *Schmerber* involved an alcohol-involved accident, the similarity of the two records end there. In *Schmerber*, the Court noted "where time had to be taken to bring the accused to the hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." This passage does not accurately describe the circumstances surrounding Weems's blood draw. First, Deputy Bustamante testified that the hospital was only a "couple of minutes" away. So transporting Weems to the hospital did not necessarily make obtaining a warrant impractical or unduly delay the taking of Weems's blood to the extent that natural dissipation would significantly undermine a blood test's efficacy. Second, Bustamante was not alone charged with both investigating the scene of the accident and escorting Weems to the hospital for treatment. Deputy Shannon—Bustamante's instructor—waited with Bustamante and Weems at the hospital until Weems's blood was taken. Once the blood was drawn, Shannon left the hospital to place the blood sample in the evidence locker at the Magistrate's Office for subsequent testing. Another officers' presence or the "hypothetically available officer" that, in theory, could have secured a warrant in the arresting officer's stead will certainly not render all warrantless blood draws a Fourth Amendment violation, nor do we suggest it is a circumstance that the State must disprove in every case to justify a warrantless search under an exigency theory. But this record establishes that Shannon was with Bustamante and Weems throughout the investigation and while they were at the hospital waiting for Weems's blood to be drawn. On this particular record, Shannon's continued presence distinguishes *Schmerber* from the present case and militates against a finding that practical problems prevented the State from obtaining a warrant within a time frame that preserved the opportunity to obtain reliable evidence.

Id. at 582 (footnoted citations omitted).

The Application of the Law to the Facts Herein

The totality of the circumstances demonstrated by the record herein supports the conclusion of the court of appeals that the State satisfied its burden to prove that exigent circumstances existed such that a warrantless blood draw was reasonable. These circumstances included the fact that, at the time of the offense, Williamson County did not have a "24-hour magistration service." 4 R.R. at 24. According to the testimony of Judge Porter, this meant that there was no magistrate on duty at the jail after hours. 4 R.R. at 23. The record reflects that the traffic stop in this case occurred at approximately 2:30 a.m. 4 R.R. at 10. Thus, the trial court could reasonably infer that no magistrate was available at the jail to sign a search warrant for Balkissoon's blood and that, in order to obtain a warrant, Reisen would need to call a judge and arrange for a meeting. As Reisen explained in his testimony, obtaining a warrant after hours was a "lengthy process." 4 R.R. at 16. According to Reisen, it would have required him to: (1) transport Balkissoon to the county jail, where Balkissoon would first need to be "booked in" to the jail; (2) complete paperwork to obtain a warrant and have that paperwork reviewed and approved by a prosecutor via email; (3) "drive to the Judge's house; got to get him to read over it, sign it"; (4) "drive back to the jail; sign some paperwork to get [Balkissoon] out of the jail to drive him to the hospital"; and (5) "wait at the hospital for a little bit in triage until a qualified

technician comes down" and draws the blood. 4 R.R. at 16. Reisen testified that this process had recently taken him approximately four hours, with a cooperative suspect. 4 R.R. at 16. In contrast, Reisen testified that the process for drawing Balkissoon's blood without a warrant was "[n]ot long." 4 R.R. at 15.

Additionally, the record reflects that Trooper Reisen stopped, investigated, and arrested Balkissoon without the assistance of other officers.[3] 4 R.R. at 16-17; SX1. Consequently, Reisen testified, if he had attempted to secure a warrant, there would have been no other officers available to assist him with completing the warrant paperwork or with taking custody of Balkissoon while Reisen began the process of securing a warrant. 4 R.R. at 17. The record also reflects that Balkissoon's vehicle needed to be towed, and there was no other officer to assist Reisen with that task. 4 R.R. at 17; SX1. Therefore, Reisen waited at the scene with Balkissoon until the tow truck arrived. SX1. The tow truck did not arrive until one hour had elapsed from the time of the initial traffic stop. SX 1. This delay was due, in large part, to Balkissoon's unwillingness to answer Reisen's questions, which, in the words of

[3] Balkissoon argues that Trooper Reisen met with a Williamson County Sheriff's Deputy during the arrest and then "sends them on their way." Balkissoon's Brief, at p. 15. The State concedes that another voice can be heard on the patrol car video of the arrest, and that the voice is later identified, at trial, as the voice of a Sheriff's Deputy; however, Balkissoon does not cite to any evidence in the record which supports his contention that Reisen "sends them on their way." Further, the State's review of the record did not reveal any such evidence. At trial, Reisen testified that his radio went out and the deputy was sent to check on him, as a safety precaution. Reisen further testified that the deputy did not otherwise provide any aid or assistance to him. 5 R.R. at 54.

Reisen, caused everything to be "prolonged." 4 R.R. at 11-12.

Given the foregoing facts, the trial court could have found that the absence of other officers to assist Reisen, combined with the then-existing difficulties of obtaining a warrant in Williamson County after hours, including the absence of a magistrate on duty at the jail, made obtaining a warrant impractical in this case. Therefore, the Court of Appeals did not err in concluding that exigent circumstances were present here which justified Reisen's decision to proceed with obtaining a blood sample from Balkissoon without a warrant.

Ground Three – Can Law Enforcement create their own exigent circumstances?

This Court granted review as to Balkissoon's third issue; however, the State would note that both the United States Supreme Court and this Court have previously addressed this issue.

In *Turrubiate v. State*, 399 S.W.3d 147 (Tex. Crim. App. 2013), this Court acknowledged, and apparently adopted, the U.S. Supreme Court's holding in *Kentucky v. King*, 563 U.S. 452 (2011). This Court noted the following:

> In *King*, the Court held that, when probable cause and exigent circumstances exist, police officers may enter a home without a warrant, *even when their conduct created the exigency*, as long as the officers did not create the exigency by violating or threatening to violate the Fourth Amendment. 563 U.S. at 462. The Court assumed

> that an exigency existed and decided only the question, "Under what circumstances do police impermissibly create an exigency?" *Id*. at 471. The Court determined that police officers loudly knocking on the door of an apartment and announcing their presence did not violate or threaten to violate the Fourth Amendment. *Id*. It disavowed many state-court approaches, including faulting a police officer who, after acquiring evidence sufficient to establish probable cause to search, did not seek a warrant, but instead knocked on the door to speak with an occupant or to obtain consent to search. *Id*. at 466-67.

Turrubiate, 399 S.W.3d at 152 (emphasis added). Thus, the Supreme Court's opinion in *King* effectively overruled the proposition stated by Balkissoon in his brief that "[t]he police may not create their own exigency to make a warrantless arrest or search." Balkissoon's Brief, at p. 14. Rather, the rule properly stated is that: the police may not *impermissibly* create an exigency *by violating or threatening to violate the Fourth Amendment* to make a warrantless search. *See King*, 563 U.S. at 462; *Turrubiate*, 399 S.W.3d at 152.

Balkissoon does not argue that Trooper Reisen violated or threatened to violate the Fourth Amendment. Instead, Balkissoon argues that Reisen created the exigency by doing all the work himself and not utilizing local resources. Balkissoon's Brief, at p. 15. Balkissoon's argument is akin to the "reasonable foreseeability" test which was discussed by the U.S. Supreme Court in *King*. This test provides that police may not rely on an exigency if "it was reasonably foreseeable that the investigative tactics employed by the police would create the

exigent circumstances." *King*, 563 U.S. at 466. The Supreme Court in *King* considered and rejected the "reasonable foreseeability" test finding that the "test would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field." *Id*.

Balkissoon has not alleged, and the record does not demonstrate, that Reisen created the exigency by violating or threatening to violate the Fourth Amendment. Further, Balkissoon does not provide any argument or authorities as to why this Court should deviate from the U.S. Supreme Court's precedent in *King*. Accordingly, this Court should determine that, in this case, law enforcement did not impermissibly create an exigency.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State of Texas prays that this Court will affirm the judgment and opinion of the Third Court of Appeals which affirmed the judgment of the trial court.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document contains 6,610 words (excluding the cover, table of contents and table of authorities). The body text is in 14-point font, and the footnote text is in 12-point font.

/s/ René B. González
René B. González

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing State's Brief on Discretionary Review was electronically served upon Petitioner's counsel of record, Mr. M. Ariel Payán, Attorney at Law, 1012 Rio Grande Street, Austin, Texas 78701, at arielpayan@hotmail.com , and upon the Office of the State Prosecuting Attorney, Ms. Stacey M. Soule, P. O. Box 13046 Austin, Texas 78711-3046, at information@spa.texas.gov , on the 12th day of April, 2017.

/s/ René B. González
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